Supreme Court, U.S.
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No. 77-1617

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT J. LACKLEN, PETITIONER

v.

ALAN K. CAMPBELL, CHAIRMAN, CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that it was improper for the district court to grant judgment against him without a trial.

1. Petitioner, a former Director of Personnel Management Evaluation at the Department of Labor, filed a complaint in the United States District Court for the District of Columbia alleging that he had wrongfully been forced to resign from his position. Petitioner sought reinstatement to his position with back pay and expunction of certain information contained in his personnel file. Petitioner also sought damages from Robert E. Hampton, then Chairman of the Civil Service Commission, for maintaining such information in his file, for allegedly causing an audit of his tax returns, and for allegedly interfering with his pursuit of professional employment and research. Petitioner claimed that Hampton had caused the audit of his tax returns for the

years 1971 and 1972 and had caused the Central Intelligence Agency to terminate negotiations with petitioner for research to be performed for that agency (Pet. App. 3a-5a).

The background of petitioner's claim is as follows. While petitioner was employed at the Department of Labor in 1970, he consulted on several occasions with an attorney representing the plaintiffs in *Douglas v. Hampton*, 512 F. 2d 976 (C.A.D.C.), in which plaintiffs complained that the Civil Service Commission's "Federal Service Entrance Examination" was racially discriminatory. Petitioner furnished to plaintiff's counsel in that case certain technical advice and assistance dealing with the validity of intelligence measures as applied to black persons. The General Counsel of the Civil Service Commission later asked the Justice Department to ascertain whether this consultation was a conflict of interest, which might violate 18 U.S.C. 205. Although an investigation was undertaken (Pet. App. 32a-54a), no prosecution was initiated (Pet. App. 4a-5a). Documents concerning the investigation were retained in petitioner's employment file. When petitioner's job was abolished, he resigned from the government and did not exercise his right to continued employment.

2. The district court properly dismissed petitioner's claim for expunction of information in his personnel file. Petitioner presently has an adequate administrative remedy, with subsequent judicial review, under the Privacy Act. See 5 U.S.C. 552a (d) and (g). Petitioner has not pursued those remedies, and the expunction claim thus was properly dismissed for want of exhaustion of administrative remedies. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *McGee v. United States*, 402 U.S. 479, 484.

For the same reason, the district court properly dismissed petitioner's claim for reinstatement and back pay. If petitioner voluntarily resigned, he obviously has no claim. The district court recognized, however, that a "coerced" resignation can constitute an adverse personnel action. If the resignation was equivalent to a dismissal, adequate administrative remedies are available and must be exhausted before suit. See *Goodman v. United States*, 424 F. 2d 914 (C.A.D.C.). There is no indication that petitioner's reinstatement claim has ever been presented to the employing agency or to the Civil Service Commission, or that exhaustion of available administrative remedies should be excused on the ground of futility. The district court therefore properly dismissed the reinstatement claim. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 69-78 and n. 22.

It was also proper for the district court to grant summary judgment against petitioner with respect to the claim for damages from defendant Hampton personally. It was clearly within the scope of Hampton's discretionary duties as the head of the Civil Service Commission to cause a possible conflict to be investigated and to maintain relevant information in petitioner's personnel file. See 28 U.S.C. 535(b), which requires agency officials expeditiously to refer to the Department of Justice information that may establish a criminal violation by government employees. Hampton therefore was immune from personal liability for his initiation of the inquiry. See *Butz* v. *Economou*, No. 76-709, decided June 29, 1978, slip op. 36-37.

Moreover, the district court gave petitioner the opportunity to discover information that might suggest the existence of bad faith, departure from duty, or malicious interference with petitioner's pursuit of professional employment. Petitioner presented no such

factual information, despite the district court's grant of supplemental discovery (Pet. App. 11a). Similarly, petitioner did not contradict an affidavit from a responsible official stating that petitioner's tax returns were chosen for audit solely through standard computer procedures, or an affidavit of the Central Intelligence Agency stating that the Agency had no record of any employment negotiations with petitioner (*id.* at 11a-12a). Under Fed. R. Civ. P. 56(e), therefore, summary judgment was proper whether Hampton's immunity is absolute or only qualified. See *Procunier* v. *Navarette*, No. 76-446, decided February 22, 1978; *Butz* v. *Economou*, *supra*, slip op. 19, 27-29. See also *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, which rejects petitioner's argument that summary judgment procedures violate the Seventh Amendment. The rulings of the district court and the court of appeals correctly applied recognized principles to the facts of this case, and there is no occasion for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1978.

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